FILE COPY

IN THE

Supreme Court of the United States

No. 697

Term, 194

HARRY J. ALKER, JR., and MAMIE DuBAN, Individually, and as Executrix of the Estate of ALFRED A. DuBAN, Deceased,
Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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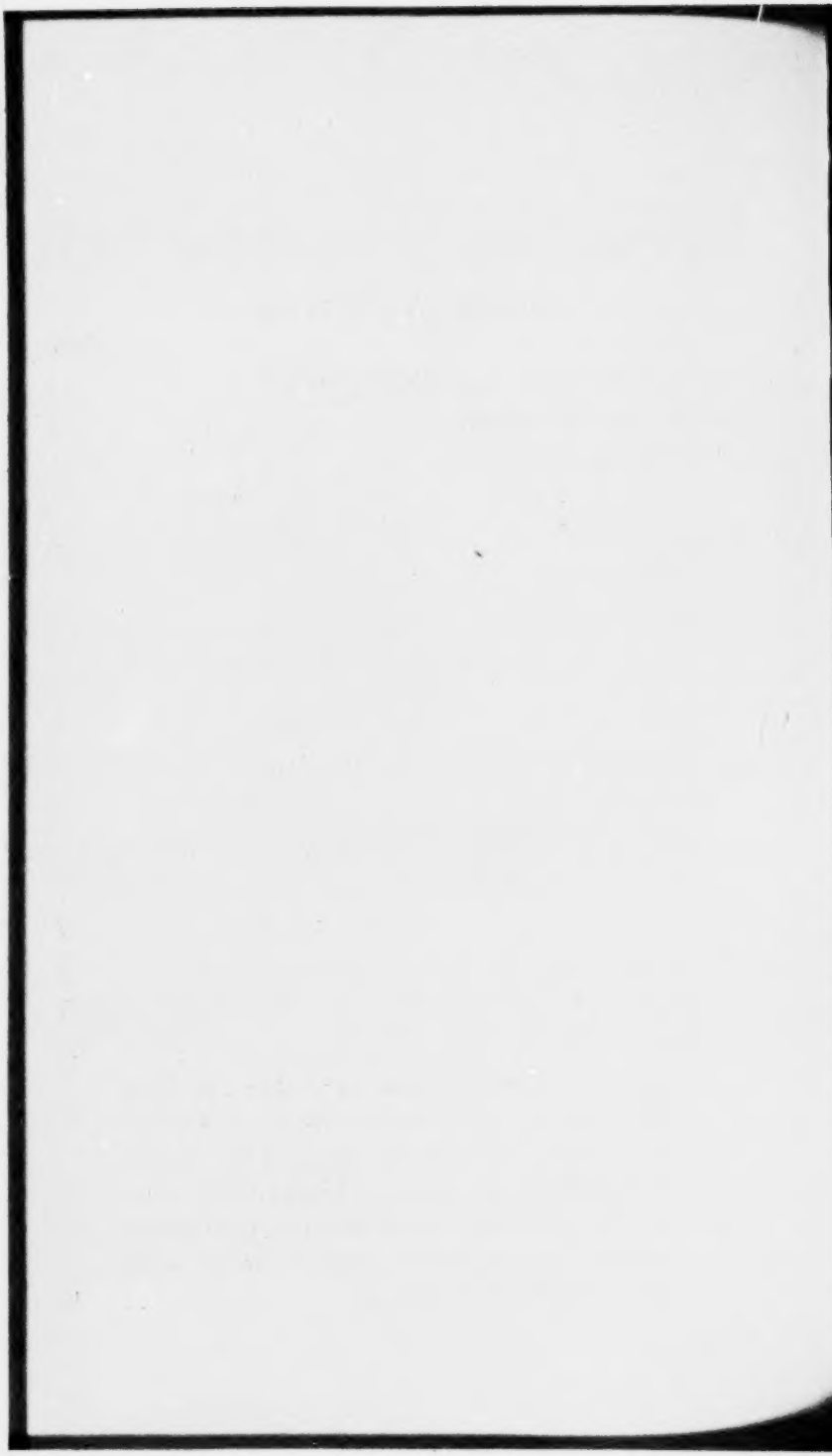

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IN THE

Supreme Court of the United States.

No. . TERM, 19 .

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, respectfully petition this Honorable Court for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and respectfully show:

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an equitable action by the Federal Deposit Insurance Corporation to recover from the defendants an alleged deficiency on a certain note after selling to itself most of the collateral with the note; there was an oral

agreement as to time of payment of the note but the Court found against the defendants as to the note because of indefiniteness as to time of the agreement. The Trial Court specifically, however, found there was no fraud. Judgment was entered against the defendants. A motion for new trial was made and refused. An appeal, assigning various errors of the Chancellor, was taken to the Circuit Court, which affirmed the judgment as a matter of law, holding the case was controlled by the decision in *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447. A petition for certiorari was refused by this Court, 327 U. S. 799.

The motion for new trial in the lower Court was thereafter renewed because of after-discovered evidence; and then an application to the Circuit Court of Appeals for permission on the part of the District Court to hear the same. The application was declined, as was a motion for reconsideration of said application.

The basis of the application to the Circuit Court was after-discovered evidence. which petitioners contended was sufficient to take this case out of the rule of the D'Oench, Duhme decision (supra). This evidence consisted of the testimony of one John Pellini, Jr., who was absent from the country at the time of trial and in actual combat service from early in 1943 until sometime in 1946. His depositions were taken and transcribed by the court stenographer to the effect that he personally knew the loan in 1936 was extended for another ten years, that in 1936 a new note was demanded by the Bank Examiner, that the original notes were not returned by the bank to the maker, Mr. Alker, until about six weeks after the new note was given to the bank in December, 1936; and the new notes when returned, bore the endorsements as to oral agreements as they now appear, as part of the record. This witness had been the office manager for Mr. Alker.

The after-discovered evidence further consisted of the depositions of Mr. C. B. Matzinger, a bank examiner, who

stated that he examined the closed bank's books for three years, acting in conjunction with the Federal Examiners; that this particular loan was discussed with the bank officials, as well as the large amount of insurance and the agreement as to the attorneys fees, deposited along with the other collateral, and that the bank officials advised the Examiners of the agreement as to this loan. This happened each year. Attention is called to the fact that none of these depositions have been made a part of the certified record of the proceedings before the Circuit Court although they were filed with the Court. Whether the Circuit Court had these depositions before it, when considering the application, is not clear from either the record or the opinion of the Circuit Court.

The after-discovered evidence also consisted of a public announcement that the F. D. I. C. had acted with various Philadelphia banks in making the loan to the Integrity Trust Company; that the collateral had been held for the benefit of itself and all the banks, and the Federal Deposit Insurance Corporation had acted as liquidator for all. The Federal Deposit Insurance Corporation further announced that the banks had been paid in full, and it had either paid itself or had enough in hand to pay itself.

The after-discovered evidence also consisted of the original notes, which had been found after Pellini's return, which notes bore a reference to the agreement. The Circuit Court in its decisions had ruled that there was no evidence in the records of the bank as to any agreement about this loan. This after-discovered evidence was offered to overcome that ruling.

The original notes themselves were found after the return of John Pellini, Jr., from overseas. One of these notes bore the endorsement:

> "For addtl collateral and agreement with Mr. Alker
> and A. A. DuBan
> see W. K. H."

and the other bore the endorsement:

"For addtl. collateral and agreement with Alker and
A. A. DuBan
see other note and W. K. H." *

and they were presented to the Circuit Court, together with an offer of proof that the endorsements had been placed thereon by the bank; that they were there when the new note of 1936 was prepared and executed by Alker and they were on the notes when the notes about six weeks later were returned to Alker.

The Circuit Court in refusing the application erroneously acted for the following reasons:

1. The facts in the case, being complicated and after-discovered evidence of a substantial character having been offered, the case should have been remanded to the District Court for a full and complete study of the after-discovered evidence and the taking of such further testimony as it might seem proper.

2. From its own record, it appears that the Circuit Court did not have before it the depositions of the witnesses that were taken.

3. By its action, the Circuit Court has denied the petitioners due process of law because they have been denied the right to present this highly important after-discovered evidence to the proper court.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, C. 229, Section 1, 43 Stat. 938; 28 U. S. C. A. 347 (a).

The motion for leave to file in the District Court of a petition for rehearing was finally denied by the Circuit Court on December 26, 1947.

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* The initials "W. K. H." in both endorsements refer to Walter K. Hardt, who had been the President of the Integrity Trust Co.

QUESTIONS PRESENTED.

1. The facts being complicated, and substantial after-discovered evidence having been brought to the attention of the Circuit Court, did the Circuit Court deny the defendants due process of law in refusing to direct the Trial Court to give a full hearing on the after-discovered evidence?

2. Did not the Circuit Court err in reaffirming its opinion that the matter was still controlled by *D'Oench, Duhme & Co. Inc. v. F. D. I. C.*, 315 U. S. 447, without affording the defendants a full opportunity to present to the Court of original jurisdiction all of the after-discovered evidence, where the after-discovered evidence indicated that the records of the insured bank do disclose that there was an agreement as contended by the defendants, the Circuit Court's decision being based on the theory that there was no such evidence.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Third Circuit has decided an important question contrary to both the statutes governing this matter and the decisions of this Court. *National Brake & Electric Company v. Christensen*, 254 U. S. 426; 65 L. E. 341; *Simmons Co. v. Grier Brothers Co.*, 258 U. S. 82; *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238.

2. The United States Circuit Court of Appeals for the Third Circuit in refusing the application has denied the defendants due process of law, because it has barred the defendants from a full and complete hearing of all the evidence in an equity proceeding.

3. The Circuit Court of Appeals for the Third Circuit erred in finding that the after-discovered evidence showed that the agreement was among the records of the bank for *only six days*, whereas the evidence offered showed that it

was there at *least six weeks* and how much longer defendants could not tell because the records of the bank were exclusively in the possession of the bank.

4. The United States Circuit Court of Appeals for the Third Circuit, because the facts are complicated, and there being substantial after-discovered evidence of a new character, erred and exceeded its authority in reaffirming its original decision, and in not referring the case back to the District Court for a complete rehearing on the after-discovered evidence.

PRAYER FOR WRIT.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and the proceedings of the said United States Circuit Court of Appeals in the case at bar, and entitled on its Docket as No. 8805, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, appellants, v. Federal Deposit Insurance Corporation, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Court, and for such further relief as this Court may deem proper.

And your petitioners will ever pray.

HARRY J. ALKER, JR.,
MAMIE DUBAN, Individually, and
as Executrix of the Estate of
Alfred A. DuBan, Deceased,
by EDWIN HALL, 2nd,
A. D. BRUCE,
HARRY J. ALKER, JR.,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The original opinion of the United States Circuit Court of Appeals for the Third Circuit is reported in 151 Fed. (2d) 907.

The opinion of the District Court is not reported, but is set forth in the Original Record at pages 475a-481a.

The opinion of the United States Circuit Court of Appeals on the petition in the nature of a bill of review is reported in 163 Fed. (2d) 123.

The opinion of the United States Circuit Court of Appeals on a petition for rehearing of the petition in the nature of a bill of review is reported in 164 Fed. (2d) 469.

The order of the United States Circuit Court of Appeals on defendants' motion for leave to file a petition for rehearing is not reported but is set forth in the Record on pages .

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Sec. 347 (a).

The date of the order of the Circuit Court of Appeals denying the prayer of the petition of the defendants for leave to file a petition for rehearing is December 26, 1947.

STATEMENT OF THE CASE.

In 1929 Harry J. Alker, Jr., borrowed from the Integrity Trust Company about $600,000., giving his note therefor, and as security various collateral, worth far in excess of the loan. Later the Trust Company split the loan

and had Mr. Alker execute on May 25, 1931, two demand notes in favor of the Integrity Trust Company. The collateral depreciated and Alker and one DuBan loaned additional collateral to the bank and entered into certain agreements conditioned upon an agreement of forbearance by the Trust Company. The time of forbearance was later extended and a new note given in substitution of the first notes. The Trust Company closed. Before it had closed large loans were made to it by the plaintiff and various other banks; the Federal Deposit Insurance Corporation taking over as collateral for the benefit of itself and the said other banks, certain notes with the accompanying collateral. Alker and DuBan complied with their part of the agreement. The Federal Deposit Insurance Corporation, notwithstanding the agreement, which it had recognized for two years, called the loan, sold a large part of the collateral to itself (a large part of it for $1. per the lot of securities) and brought this equitable action to establish a deficiency and force the transfer of certain collateral. The District Court found in favor of the plaintiff on the ground that the agreement was too indefinite as to time, but found specifically that there was no fraud. An appeal was taken to the Circuit Court of Appeals for the Third Circuit, which affirmed the finding of the District Court, basing its opinion, however, solely on the fact that the agreement was a secret agreement and came within the rule of *D'Oench, Duhme Co. v. Federal Deposit Insurance Corporation,* 315 U. S. 447, and not passing on the other questions involved. An appeal was taken to your Honorable Court which refused a certiorari 327 U. S. 799.

Shortly after this John Pellini, Jr., who had been in the United States Army and overseas for three years, returned to Philadelphia. He had been Alker's office manager and confidential clerk, handling many of the details relating to the loan. The defendants also learned of a Mr. Matzinger, a former State Banking Examiner, who had examined the affairs of the Integrity Trust Company

for several years prior to the closing. The defendants at the trial and at the time of filing the petition for certiorari did not know his name, his whereabouts or even that there had been such a person. Then after John Pellini returned, the original notes, duly endorsed with a reference about the agreement, were found. Depositions of these witnesses were taken as well as others.

About this time there was a public announcement in the newspapers that sufficient funds had been realized from the assets of the closed bank so that all the local banks which had made loans to the closed bank had been repaid, and enough funds have remained for a long time to repay also the Federal Deposit Insurance Corporation in full, if they have not already done so. In that event the entire matter reverts to the State Receiver who could not avail itself of this defense.

The District Court felt an application should be made to the Circuit Court of Appeals for authority to the District Court to reconsider the motion for new trial. Application was so made. The Circuit Court considered the same and dismissed the petition, 163 Fed. (2d) 123. Application for reconsideration was presented and again refused 164 Fed. (2d) 469. A motion for leave to present a petition for rehearing was filed, and said motion was refused. This appeal was then taken.

ARGUMENT.

I. The Facts Here Being Complicated and Substantial After-Discovered Evidence Having Been Brought to the Attention of the Circuit Court Did the Circuit Court Deny the Defendant Due Process of Law in Refusing to Direct the Trial Court to Give a Full Hearing on the After-Discovered Evidence.

Apparently the Circuit Court of Appeals relied upon the majority opinion in *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238 for its method of acting upon this petition. In doing so, the Court failed to distinguish between the *Hartford* case (supra) and this case. In the Hartford case (supra) it was alleged that fraud had been perpetrated on the Circuit Court itself. Because of this allegation and the fact that it was not alleged that the fraud was perpetrated on the District Court, the Circuit Court retried the case itself. It was because of this feature alone that the Supreme Court in its 5-4 opinion sustained the Circuit Court, although the minority wrote a very strong opinion disapproving of this procedure. This is evident by footnote number 5 found at the bottom of page 245, which is as follows:

> "Moreover, we need not decide whether, if the facts relating to the fraud were in dispute and difficult of ascertainment, the Circuit Court here should have held hearings and decided the case or should have sent it to the District Court for decision."

In the present case the District Court specifically found there was no fraud. There was therefore no justification for a hearing on the merits by the Circuit Court as no fraud was practiced on the Circuit Court but on the contrary under the law and all decisions other than the *Hartford* decision (supra) (which as heretofore stated stood on its own facts because of the fraud on the Circuit Court) the motion should have been granted and the Dis-

trict Court directed to entertain the motion for new trial and consider all the after-discovered evidence. A hearing by the District Court would have enabled the defendants to have had a full opportunity to present the testimony in open Court subject to cross-examination. In only this way would the evidence be gotten before the proper Court for its full consideration. *Simmons Co. v. Grier Bros. Co.*, 258 U. S. 82; *National Brake & Electric Co. v. Christensen*, 254 U. S. 426, 65 L. E. 341.

The procedure as followed by the Circuit Court amounted to a denial to the defendants of due process of law because they were not given an opportunity to have the after-discovered evidence fully presented to and passed upon by the proper tribunal. The essential elements of due process of law are notice and an opportunity to be heard. *Boone v. Wachovia Bank & Trust Co.*, 163 Fed. Rep. 2nd 809, 816. The latter opportunity was denied to the defendants by the Circuit Court's action. The application before the Circuit Court was in the nature of a pro forma motion, not a hearing on the merits of the case.

II. Did the Circuit Court Err in Re-Affirming Its Opinion That the Matter Was Still Controlled by the Decision in D'Oench, Duhme Co. v. F. D. I. C., 315 U. S. 447 Without Affording the Defendants a Full Opportunity to Present to the Court of Original Jurisdiction All of the After-Discovered Evidence Where Such Evidence Indicated That the Records of the Bank Had Disclosed That There Was an Agreement as Contended by the Defendants, the Circuit Court's Decision Being Based on the Theory That There Was No Such Evidence.

While in the case of *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, it was held by the majority opinion that the Circuit Court in that case was justified in hearing the case because fraud existed, and that fraud was perpetrated upon that very Circuit Court, the minority opinion written

by Justice Roberts expresses the general rule as to all but such exceptional cases in which there was fraud, of which the *Alker* case is one (the District Court having found there was no fraud).

Justice Roberts in the case of *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, 271, well said:

> "On the question what amounts to a sufficient showing to move an appellate court to grant leave to file an appeal of review in the trial court, the authorities are not uniform. Where the lack of merit is obvious, appellate courts have refused leave but where the facts are complicated, it is often the better course to grant leave to allow available defenses to be made in answer to the appeal. In the present instance I think it would have been proper for the court to permit the filing of the appeal in the District Court where the rights of the parties to summon, to examine, and to cross-examine witnesses, and to have a deliberate and orderly trial of the issues according to the established standards would be preserved."

The case now before the Court was an equitable action by the Federal Deposit Insurance Corporation to collect on a note as to which there is an agreement that was beneficial to the bank. At the time of the trial the Court held no evidence was produced showing that the records of the bank contained a reference to the agreement. The Federal Deposit Insurance Corporation contended at the trial it was not bound by the agreement, the agreement being against public policy. (The case was tried on the theory that the Federal Deposit Insurance Corporation had loaned the Integrity Trust Company certain moneys and taken over for its own benefit various assets of the bank, including the note and collateral in question.)

After the trial of the case, the appeal, and the return of the case to the Circuit Court, John Pellini, former office

manager and employee of Alker, returned from the Army, having been overseas in actual combat service at the time of the trial and not available. He was thoroughly familiar with the whole transaction and on his return made a deposition that the bank officials had advised him of the agreement and that it had been extended for ten years from 1936. He was also familiar with the form of the notes and when the first note was returned to Alker. After the discovery of the notes an effort was made to take his deposition to the effect that in December, 1936, the new note was delivered to the Integrity Trust Comapny and it was not until more than six weeks thereafter that the original two notes were returned to Alker; thus proving that the old notes with the endorsements thereon were in the possession of the bank for at least that period of time. He also offered to prove that the new note of 1936 was given because the Bank Examiner who was examining the bank had requested the same; that the new note was given while the examiner was there, so that the old notes and the new note were there while he was there and examined by him. The testimony shows that the Federal Deposit Insurance Corporation relied entirely upon the examiners for its information.

The old notes were found after Pellini returned, having been lost, and on these old notes were endorsements as follows:

"For addtl collateral and agreement with Mr. Alker and A. A. DuBan
see W. K. H."

"For addtl. collateral and agreement with Alker and A. A. DuBan
see other note and W. K. H." *

John Pellini offered to testify that these endorsements were on said notes when the notes were returned to Alker by the bank.

Only recently a man who was a former Bank Examiner was discovered at Easton, Pa., who had examined the

* The initials "W. K. H." in both endorsements refer to Walter K. Hardt, who had been the President of the Integrity Trust Co.

Integrity Trust Company for the State Banking Department for several years prior to the closing. He, his name and whereabouts were unknown to defendants at the time of the trial, and he was only located recently by accident. He appeared and offered a deposition that the Integrity officials had advised the Examiners about the agreement relating to the Alker note and advised the Examiners why they had made the agreement. He subsequently on reflection offered to appear again and offer more detailed valuable testimony if the Court would permit it.

It was further learned after the trial of the case by a public announcement by the Federal Deposit Insurance Corporation that the Federal Deposit Insurance Corporation did not hold the note and collateral for its own benefit but for the benefit of itself and various other banks who had loaned the Integrity money and were familiar with and had ratified the agreement; that the Federal Deposit Insurance Corporation was merely a liquidator for all of them and therefore not an innocent holder for value. This fact was not known until the Federal Deposit Insurance Corporation disclosed it in public print. No statement as to it was made by the Federal Deposit Insurance Corporation at the trial of the case. The testimony shows that the other banks had representatives on the Board of Directors and Executive Committee of the Integrity Trust Company, and one of their number, Mr. Gest, who acted as the dean of the representatives of those banks, had discussed and approved the agreement a number of times.

The Federal Deposit Insurance Corporation announced in the public print that it has paid itself in full its loan or has more than sufficient in hand to pay itself in full. This being the case it has and has had for a considerable period of time no further interest in this matter. This matter would revert or should have reverted to the Secretary of Banking, Receiver in Charge of the Integrity Trust Company. The Integrity Trust Company was a party to the agreement and it approved of it and benefited by it. It has

never repudiated it. It therefore would have no defense and the case should have been remitted by the Circuit Court for a hearing and determination of this question.

The Circuit Court in dismissing the motion reiterated its opinion that this case was controlled by the *D'Oench, Duhme* case, to wit: that reference to the agreement did not appear on the records of the bank for sufficient time and that the Federal Deposit Insurance Corporation was not bound by it, it being against public policy—all of this despite the fact that there was a finding that there was no fraud connected with it; that testimony was now offered or proposed to be offered that the record for at least six weeks showed the agreement; that the Bank Examiner was there at the time and saw the old notes and the new note with their respective endorsements; that the Bank Examiner was the agent of the Federal Deposit Insurance Corporation in the matter. The Circuit Court further had the testimony of the Bank Examiner who testified that the very nature of the collateral itself was notice, to wit:—the assigned fees, and insurance policies; that the officials of the bank had advised the Examiners of the agreement for at least three years.

III. The Circuit Court Did Not Give Proper Consideration to or Fully Comprehend the Evidence Submitted.

That the Circuit Court did not give proper consideration to, or fully comprehend the evidence which defendants offered in support of their petition, is shown by the many misstatements by the Court and inaccuracies in its opinion in 164 Fed. 2nd 469, some of which are as follows:

Alker did not contend, as alleged by the Circuit Court in 164 F. 2nd, 469, 470, "the legends quoted *were typed* by the Trust Company on the two original notes at or about the time when the new consolidated note, dated December 11, 1936, was delivered to him by the Trust Company." On the contrary Alker contended (1) the legends were placed on the original notes by the trust company—itself—just when he did not know; (2) they were there when the new

consolidated note dated December 11, 1936, was requested and given—because the representative of the bank said he was protecting Alker on the agreement by the endorsement on the new note in accordance with endorsements on the first notes. They were there when the notes were returned to Alker. Alker did not contend the notes with the legends on them were in the bank records six days. Alker contended, on the contrary, they were there, so far as he knew, at least six weeks—how much longer he did not know because they were the records of the bank to which he had no access. A period of at least six weeks elapsed, according to Alker and Pellini between the time the new note was given and the return of the old notes to Alker. How long the endorsements were on the original notes which were in the possession of the bank, the defendants would not know as the notes were in the exclusive possession of the bank.

The Circuit Court says erroneously that "the petitioners make no claim to the contrary that after the original notes were returned to Alker on or about December 11, 1936, (the evidence offered was that they were not returned until the latter part of January, 1937), the trust company had no record of the legends." On the contrary Alker offered to prove that the bank representative inserted on the new note on or about December 11, 1936, a legend carrying forward the legends which then appeared on the original notes, and therefore there was among the bank records a record of the legends and agreement.

An examination of the new note shows the Circuit Court also erroneously states "More than four years later" (after December 11, 1936) "the Trust Company assigned the consolidated note and the collateral with all its other banking assets, with certain immaterial exceptions, as security for a loan of about $20,000,000. made to it by the F. D. I. C. on the usual terms."

On the contrary the testimony offered by Alker was that the Federal Deposit Insurance Corporation recently announced that the collateral assigned was for the benefit

of itself and a number of other banks. This fact at no time was disclosed to the public until long after the trial. These banks had through their representatives approved the Alker agreement, and understood the agreement and the endorsement on the new note, and had seen the old notes and the endorsements. The Federal Deposit Insurance Corporation and these banks were partners in the transaction, and by reason of that fact alone the Federal Deposit Insurance Corporation was therefore bound by what they had done.

It was quite possible that the endorsements were on the notes when the photographic copies were taken, and that through defective photography the endorsements on the end of the notes were omitted. That this might well be, is proven by the copies of the notes attached to the printed record. There the back of the notes as they there appear are quite different from the back of the original notes (letters being out of place due evidently to poor photography). It is quite common for a photograph of an instrument to miss the marginal references, and the notations here were on the very end of the notes. Poor photography of checks was especially true in 1936 when the photographing of notes was in its infancy and very few banks had adopted the practice.

IV. The Facts Being in Dispute, the Circuit Court Either Should Have Held Hearings Before Deciding the Case, at Which the Witnesses Could Appear and Testify, or It Should Have Sent the Matter Back to the District Court for the Taking of Testimony and Decision.

The majority opinion of the Court in the *Hazel-Atlas* case (supra) page 244, well said:

> "From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. . . . This equity rule, which was firmly established in English practice long

before the foundation of our Republic, the Courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule" . . . "Where the occasion has demanded, where enforcement of the judgment is manifestly unconscionable, Pickford v. Talbott, 225 U. S. 651, 657, they have wielded the power without hesitation."

V. The Court Erred in Dismissing the Motion Without Hearing.

Here there was a conflict of facts. It was therefore the defendants' right to a hearing. The one body which could, in the absence of fraud perpetrated on the Circuit Court of Appeals, hear this testimony was the District Court. The matter should therefore have been referred to the District Court, and it was error not to have done so.

CONCLUSION.

For the foregoing reasons the defendants claim

(1) That they have been deprived of due process of law;

(2) That the facts being complicated and in dispute and difficult of ascertainment, the Circuit Court of Appeals should have remitted the matter to the District Court for hearing in accordance with the law in such cases made and provided;

(3) That the proofs offered show that the records of the bank did show the agreement and the case was therefore not controlled by the *D'Oench, Duhme* case; and that a petition for certiorari should be allowed.

Respectfully submitted,

EDWIN HALL, 2ND,
A. D. BRUCE,
HARRY J. ALKER, JR.,
Counsel for Petitioners.